Nos. 22634 and 22634-A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ESTATE OF JOHN F. NUTT, Deceased, EILEEN M. NUTT and FRANCES D. NUTT, Executrices,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

EILEEN M. NUTT,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITIONS FOR REVIEW OF THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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I N D E X

Page

CITATIONS

Cases:

Cases (continued): Page

Statutes:

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PRIOR OPINIONS

The original findings of fact and opinion of the Tax Court (I-R. 224-260) are reported at 39 T.C. 231. The prior opinion of this Court (II-R. 358-361) is reported at 351 F. 2d 452, and the denial of certiorari by the United States Supreme Court at 384 U.S. 918. The additional findings of fact and opinion of the Tax Court (II-R. 441-471) are reported at 48 T.C. 718.

JURISDICTION

These petitions for review (II-R. 554-559, 562-567) involve federal income taxes for the taxable years 1955, 1956 and 1957. On September 4, 1958, the Commissioner of Internal Revenue mailed to the taxpayers [1] notices of deficiency, asserting deficiencies in their taxes in the aggregate amount of $204,771.15. (I-R. 8-23, 31-47.) Within ninety days thereafter, on November 24, 1958, the taxpayers filed petitions with the Tax Court for redetermination of those deficiencies under the provisions of Section 6213 of the Internal Revenue Code of 1954. (I-R. 1-23, 25-47.) The decisions of the Tax Court were entered on April 18, 1963. (I-R. 333-334.) On July 11, 1963, petitions for review were filed (I-R. 335-345) within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. On October 1, 1965, this Court affirmed the Tax Court on one issue (II-R. 358-361) and remanded the case to the Tax Court for further proceedings with respect to the other issue. This Court denied the taxpayers' petition for rehearing on November 9, 1965 (351 F. 2d 452), with respect to the issue as to which this Court had affirmed the Tax Court, and on April 25, 1966, the United States Supreme Court denied the taxpayers' petition for certiorari (384 U.S. 918.)

1/ For convenience, John F. Nutt will be referred to herein as one of the taxpayers, although he died on January 5, 1966, and his estate, with his wife and daughter as executrices, has been substituted as a party petitioner. (II-R. 412-415, 417.)

On remand, the Tax Court entered its decisions on December 12, 1967. (II-R. 552-553.) The cases are brought again to this Court by petitions for review filed January 8, 1968 (II-R. 554-567), filed within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTIONS PRESENTED

1. Whether the Tax Court erred in determining (a) that under Arizona law stock in two controlled corporations issued in the names of each taxpayer was community property during the taxable years 1955, 1956 and 1957 and at all times from the date of its issuance until the date of the death of the taxpayer-husband; and (b) that on account of his control of the corporation as manager of the community the husband-taxpayer had the right to reacquire the land which the taxpayers had sold, with growing crops, in 1955 and 1956 to the corporations, so that the taxpayers are not entitled to capital gain treatment on their profit from the sale, within the meaning of Section 1.1231-(f) of Treasury Regulations on Income Tax which provide that capital gains are not allowable on the sale of unharvested crops where the right to reacquire the land is retained.

2. Whether the Tax Court abused its discretion in denying taxpayers' motions to reopen and for further trial in order to receive new evidence consisting of an Arizona county court's order relating to the distribution of the taxpayer-husband's estate, entered in a non-adversary proceeding in which the United States was not a party, where the Tax Court found that the new evidence, if received, would not have been persuasive to change its opinion.

3. Whether the taxpayers may reopen an issue previously decided against them by this Court, and as to which the Supreme Court denied certiorari, namely, whether profit on the assignment of short-term leaseholds with growing crops to one of their controlled corporations is entitled to capital gain treatment within the meaning of 1954 Code, Section 1231, and Section 1.1231-(f) of the Treasury Regulations on Income Tax.

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved are set forth in the Appendix, infra.

STATEMENT

The pertinent findings of the Tax Court in the earlier case involving the same taxpayers (Nutt v. Commissioner, 39 T.C. 231, affirmed in part and remanded in part, 351 F. 2d 452) (C.A. 9th), certiorari denied, 384 U.S. 918) may be summarized as follows (I-R. 224-250; II-R. 358-361):

The taxpayers, husband and wife, residing in Eloy, Arizona, filed separate federal income tax returns for each of the taxable years 1955, 1956 and 1957 with the District Director of Internal Revenue at Phoenix, Arizona. These returns were filed on a community basis under the community property laws of Arizona. The husband listed his occupation as farmer on his returns, and the wife listed her occupation on her returns as housewife. (I-R. 226-227.)

At the beginning of the 1955 cotton crop year, taxpayers owned approximately 2,400 acres of farmland and held leases on various contiguous tracts. On August 25, 1955, the taxpayers incorporated Rancho Tierra Prieta (hereafter referred to as Rancho), under the laws of Arizona, for the general purpose of engaging in the business of farming. The total authorized capital stock of this corporation was 9,000 shares common voting stock and 1,000 shares of preferred non-voting stock, both classes with a stated par value of $100 per share. The only issued and outstanding shares were 75 shares common

common voting issued to each taxpayer for which they paid $7,500 each, and two shares of preferred non-voting, one share issued to N.C. Nupen the taxpayers' bookkeeper, and one to their attorney, Charles N. Walters, for which each apparently paid $100. The officers of Rancho from the date of incorporation and throughout the taxable years were John F. Nutt, president, and Eileen M. Nutt, vice president and secretary-treasurer; the directors were the taxpayers and Mr. Nupen. (I-R. 228-229, 231; II-R. 359.)

On August 30, 1955, the taxpayers conveyed to Rancho 1,142 acres of land in Pinal County, Arizona, with unharvested cotton for $324,933.13, of which $92,660 represented the fair market value of the land, and $232,273.13 the fair market value of the growing cotton crop. On August 20, 1956, the taxpayers conveyed to Rancho an additional 942.5 acres of land in Pinal County, Arizona, with growing crops, for an agreed consideration of $273,553.75, of which $72,210 represented the fair market value of the land, and $201,343.75 represented the fair market value of the crops. Neither the deed nor the payment agreements between the taxpayers and Rancho contained provisions giving taxpayers an option to reacquire the land conveyed. Each payment agreement provided for payment to the taxpayers by Rancho of $1,000 in cash, and the balance by notes secured by mortgages on the land and crops. Schedules of payments made by Rancho to the taxpayers in each of the three taxable years are set forth in the record. (I-R. 232-233, 234-236.)

On August 27, 1955, the taxpayers incorporated Black Land Farms, Inc. (hereafter referred to as Black Land), under the laws of Arizona, also to engage in the business of farming. The corporation had total authorized capital stock of 10,000 common shares with a stated par value of $100 per share. The total issued and outstanding shares were 40 to the taxpayer-husband, 39 shares to the taxpayer-wife, and 21 to their adult daughter, Frances--all issued on August 29, 1955. The officers of Black Land from the date of incorporation and through the taxable years were John F. Nutt, president; Frances Nutt, vice president; and Eileen M. Nutt, secretary-treasurer. The taxpayers and Frances have been the directors. (I-R. 238-239.)

On August 30, 1955, the taxpayers assigned five short-term leaseholds on 1,286 acres of land, with unharvested crops thereon, to Black Land, for an agreed consideration of $97,856.87, of which $94,656.87 represented the fair market value of the unharvested crops and $3,200 represented the fair market value of the unexpired leases. The taxpayers received a $1,000 cash payment and a note for the balance due secured by a mortgage on the crops on the leaseholds, payment on this balance being made by Black Land to the taxpayers in 1955, 1956 and 1957, as shown in the record. (I-R. 240, 241.)

By a letter dated September 19, 1955, signed by the taxpayer husband as president, Rancho wrote the Agricultural Stabilization Committee, Pinal County, Casa Grande, Arizona, that it had acquired the land conveyed by the taxpayers to Rancho on August 30, 1955, and stated in part (I-R. 245):

> I understand that this land is now a part of the farm on which your records show that John F. Nutt is the operator. It is my desire that they remain as they are presently set up and not be reconstituted.

A similar letter dated September 19, 1955, signed by the taxpayer husband as president, was sent to the Agricultural Stabilization Committee by Black Land concerning the leases assigned to Black Land by the taxpayers on August 30, 1955. (I-R. 245.)

In their separate federal income tax returns for the taxable years 1955, 1956 and 1957, the taxpayers reported the gain from the sale of land and unharvested crops to Rancho, and gain from the assignment of leaseholds of land on which unharvested crops were growing to Black Land, as capital gains. The taxpayers elected to use the installment basis in reporting the gain realized from these transactions. (I-R. 249.)

The Tax Court held (I-R. 225, 255-260) that the unharvested crops on the lands conveyed to Rancho and on the leaseholds assigned to Black Land were sold to such corporations, and, under 1954 Code Section 1231(b)(4) and Section 1.1231-1(f) of the Treasury Regulation on Income Tax (1954 Code), the gains on these sales were taxable as ordinary income, because under Section 1.1231-1(f) of the Treasury Regulations on Income Tax (1954 Code), the capital gains provisions are inapplicable where taxpayers retain any right to reacquire the land the crop is on, directly or indirectly, and a

leasehold is not "land" for the purpose of Section 1231. It held (1) that as to sales of land with unharvested crops to Rancho, the capital gains provisions of Code Section 1231 were inapplicable since the taxpayers retained the right to reacquire the land by virtue of their ownership of the voting stock of Rancho; and (2) as to assignment of leaseholds with unharvested crops to Black Land, no capital gains treatment may be had since the crops were sold with leaseholds, not land. This Court affirmed the holding on the second issue but remanded the case to the Tax Court for further proceedings with respect to the first issue. (351 F. 2d 452; II-R. 358-360.)

The additional facts, as found by the Tax Court on remand (II-R. 447-452), are as follows:

The taxpayers were married on September 5, 1920, in San Angelo, Texas. In 1926, when they moved to Arizona, neither of them owned any property or money other than personal effects and household goods. They lived together in Arizona until the taxpayer-husband's death on January 5, 1966, and the taxpayer-wife still resides there. (II-R. 447.)

At no time from 1920 throughout the taxable years 1955, 1956 and 1957, did either taxpayer receive any property by gift, devise, or descent, all property which they acquired during that period having been obtained from earnings of the taxpayer-husband as an electrical lineman, or from the taxpayers' joint efforts in farming. The taxpayers executed no agreement to divide any community property into separate properties of husband and wife. (II-R. 447.)

Under all of the deeds, except three, whereby taxpayers acquired the lands, portions of which they subsequently sold to Rancho in 1955 and 1956, the lands were conveyed to John F. Nutt and Eileen M. Nutt, husband and wife. (II-R. 447.)

The deed covering approximately 80 acres of property in the Southeast Quarter of the Northwest Quarter of Section 30, Township 8 South Range 8 East, Pinal County, Arizona, executed on the 26th day of December, 1935, conveyed the land to "John F. Nutt and Ileen [sic] Nutt his wife, as joint tenants with right of survivorship." (II-R. 447.)

Another deed, executed on January 8, 1945, conveyed all of Section 8 and the North half of Section 20, except the south 165 feet of the Northeast Quarter, Township 8, South of Range 8 East, Pinal County, Arizona, with certain exceptions for railroad and road right-of-ways, to "John F. Nutt and Eileen M. Nutt, not as tenants in common and not as a community property estate, but as joint tenants with right of survivorship." (II-R. 448.)

A deed executed on the 22nd day of December 1947 conveyed the Southwest Quarter of Section 29 and the Southeast Quarter and the East half of the Southwest Quarter of Section 30, Township 8 South, Range 8 East, in Pinal County, Arizona, to "John F. Nutt and Eileen M. Nutt, husband and wife not as tenants in common and not as a community property estate, but as joint tenants with right of survivorship." (II-R. 448.)

The major portions of Section 8 and of the North half of Section 20, and of Sections 29 and 30, acquired by the taxpayers

under these deeds, were sold by them to Rancho in 1955 and 1956. Some portions of those lands were not sold by the taxpayers during any of the years here in issue, but were retained by them. (II-R. 448.)

During the years 1953 through 1955, the taxpayers maintained three bank accounts, one designated as "farming account," one as "Rancho Tierra Prieta," and one as "commercial account." The farming account was used primarily to pay expenses on a lease known as the "Wagner lease," consisting of Section 24 and approximately 63 acres in the Northwest corner of Section 30 of Township 8 South, Pinal County, Arizona. The Rancho Tierra Prieta account was used in an operation carried on prior to the incorporation of the corporation Rancho Tierra Prieta and was closed out on August 29, 1955, and the funds were placed in the taxpayers' commercial account. Most of the funds in the farming account and the Rancho Tierra Prieta account were transfers from the commercial account. Deposits in the commercial account consisted primarily of receipts from the sale of farm produce, loans received with respect to operating the farm, and receipts from sale of property. No distinction as to what section or piece of land on which the crop was raised was made in the records maintained with respect to deposits of receipts from sales of farm produce in the commercial account. The commercial account was a joint account, and either taxpayer could draw checks against it and they did draw checks against this account for their personal as well as business expenses. The taxpayer-husband determined what funds were to be placed in the commercial account, but both taxpayers drew checks on that account. (II-R. 448-449.)

On August 26, 1955, a check to the order of Rancho Tierra Prieta in the amount of $7,500 was drawn on the commercial account by John F. Nutt in payment for 75 shares of the common stock of that corporation issued to him by Certificate No. 1 of the corporation, and on August 26, 1955, a check payable to Rancho Tierra Prieta in the amount of $7,500 was drawn on the commercial account, signed "Mrs. John F. Nutt," which check was issued in payment for 75 shares of stock of that corporation evidenced by Certificate No. 2, issued to Eileen M. Nutt. Both of these certificates were signed by John F. Nutt, president, and Eileen M. Nutt, secretary, which was in accordance with the by-laws of Rancho Tierra Prieta requiring such certificates to be signed by the president or vice president and the secretary. (II-R. 449-450.)

On August 29, 1955, a check in the amount of $4,000 payable to the order of Black Land Farms, Inc., was drawn on the commercial account by John F. Nutt in payment for 40 shares of stock of that corporation evidenced by Certificate No. 1 issued to John F. Nutt, and on August 29, 1955, a check on the commercial account payable to the order of Black Land Farms, Inc., in the amount of $3,900 was drawn by Eileen M. Nutt in payment for 39 shares of stock of that corporation evidenced by Certificate No. 2 issued to Eileen M. Nutt. These stock certificates were signed by John F. Nutt, president, and Eileen M. Nutt, secretary, which was in accordance with the provisions

of the by-laws of Black Land Farms, Inc., that stock certificates be signed by the president and the secretary. (II-R. 450.)

At a special meeting of the board of directors of Black Land Farms, Inc., held on August 21, 1967, a motion was unanimously carried that a dividend of $10 per share be paid to all the shareholders of record of the common stock outstanding as of August 31, 1957. (II-R. 450.)

On the federal income tax return for the calendar year 1957 filed by John F. Nutt and on the federal income tax return for the calendar year 1957 filed by Eileen M. Nutt, dividends in the amount of $1,895.54 were reported as community property, attributable 50 percent to the wife and 50 percent to the husband. (II-R. 450.) The dividends so reported were itemized as follows (II-R. 451):

United Funds Inc. - United Accumulated Fund	$1,076.24
Massachusetts Investors Trust	129.30
Black Land Farms, Inc. (an Arizona corp.)	790.00
	$1,995.54
	(100.00)
	$1,895.54

This was in conformity with the reporting by the taxpayers during the taxable years 1955, 1956 and 1957 of all their income, including the capital gains reported on the sale of the lands, leaseholds and growing crops thereon, to Rancho Tierra Prieta and Black Land Farms, Inc., as community income, one-half of which was the income of each. (II-R. 451.)

On October 18, 1965, Eileen M. Nutt executed a will and testament in which, among other things, she stated, "I declare that all of the property which I now own is community property." Included

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On October 18, 1965, Eileen M. Nutt executed a will and testament in which, among other things, she stated, "I declare that all of the property which I now own is community property." Included

in the property which Eileen M. Nutt owned when this will was executed were the 75 shares of stock she owned in Rancho Tierra Prieta and the 39 shares of stock she owned in Black Land Farms, Inc. (II-R. 451.)

On March 4, 1966, Eileen M. Nutt filed in the Superior Court of the State of Arizona in the Matter of the Estate of John F. Nutt, Deceased, a document, which was sworn to in open court before a deputy clerk of the court, entitled, "Testimony of Applicant on Probate of Will," in which, among other things, she stated, "All of the estate of said deceased is community property, the same having been acquired since his marriage with Eileen M. Nutt." In this affidavit property of the deceased include 40 shares of stock in Black Land Farms, Inc., and 75 shares of stock in Rancho Tierra Prieta which had been issued in the name of John F. Nutt when the corporations were formed. (II-R. 451.) There has been no change in ownership of the issued shares of common stock in Black Land Farms, Inc., and Rancho Tierra Prieta on the books and records of those corporations since the original issuance. (II-R. 452.)

In December 1960, when Eileen M. Nutt received a dividend from Black Land Farms, Inc., she asked her husband if she could have it and he told her she could. She kept the amount of that dividend for her personal use and did not deposit it in the joint checking account of herself and her husband. (II-R. 452.)

The certificate of incorporation of Rancho Tierra Prieta provides that all issued shares of common stock shall have equal voting rights and the by-laws of that corporation provide that "Only persons in whose name shares entitled to vote stand in the stock records of the company on the day three days prior to the meeting of stockholders * * * shall be entitled to vote at such meeting * * *." (II-R. 452.)

The by-laws of Black Land Farms, Inc., provide that "each stockholder shall be entitled to one vote for each share of stock standing in his own name on the books of the company whether represented in person or by proxy." (II-R. 452.)

The Tax Court found as ultimate facts that the stock in Rancho Tierra Prieta and the stock in Black Land Farms, Inc. issued in the name of John F. Nutt, and the stock in these two corporations issued in the name of Eileen M. Nutt, were at all times from the date of its issue until the date of the death of John F. Nutt community property of John F. Nutt and Eileen M. Nutt. (II-R. 452.) It reiterated its previous determination that on account of the taxpayers' control of Rancho, they necessarily had the right to reacquire the land with growing crops thereon which they sold to Rancho. (II-R. 461-482.)

On August 15, 1967, the taxpayers filed a motion to reopen the case to receive allegedly new evidence. (II-R. 418-440.) Attached to the motion was a certified copy of a minute entry dated July 31, 1967, of the Superior Court of Pinal County, Arizona, entered in connection with the petition for final distribution of the estate of the taxpayer-husband, John F. Nutt, in which it was stated that the Court "FINDS that John F. Nutt was the sole owner of 75 shares common stock of Rancho Tierra Prieta, a corporation and sole owner of 40 shares of stock of Black Land Farms, Inc." (II-R. 421.) Also attached to the motion was a certified copy of a final decree of distribution (II-R. 422-440) in which John F. Nutt was also described (II-R. 440) as the sole owner of these shares.

After the opinion of the Tax Court had been entered, and after a hearing on the taxpayers' motion (II-R. 485-525), on September 15, 1967, the taxpayers filed a motion for further trial to present newly discovered evidence consisting of the same two exhibits they had attached to the previous motion. (II-R. 474-477.) Memoranda were filed (II-R. 527-549) and on November 17, 1967, the Tax Court entered its order denying the motions and stating that if the documents attached to the taxpayers' motion had been received in evidence, the additional evidence would not have been of sufficient weight to alter its conclusion (II-R. 550-551).

SUMMARY OF ARGUMENT

1. On the prior appeal this Court sustained the validity of Section 1.1231-1(f) of the Treasury Regulations which provides that capital gain benefits are not available under Section 1231(b)(4) of the Internal Revenue Code to the sale of unharvested crops with land where the taxpayers retain a right or option to reacquire the land the crops are on, directly or indirectly, except in a customary security transaction. This Court however remanded this case to the Tax Court to determine whether the taxpayers held the stock of their corporation as community property under the control of the husband.

On remand the Tax Court took further evidence and found that under Arizona law the stock was held by the taxpayers as community property subject to the management and control of the husband. These holdings are fully supported by the evidence and Arizona law. The presumption that all property acquired during marriage is community property was not overcome in this case. The taxpayers consistently treated the stock and the property by which it was acquired as community property in their operations, tax returns and pertinent documents. Section 10-231 of the Arizona Revised Statutes (Uniform Stock Transfer Act) deals with transfers of stock to bona fide third parties, and, between the taxpayers, does not affect the husband's control over the wife's community interest in the stock.

By reason of his control over the community stock, the husband taxpayer had the right to cause the corporation to reconvey the land to himself and wife at any time. Accordingly, the Tax Court correctly held that Section 1231(b)(4) of the Code did not apply and taxpayers are not entitled to capital gains on the sale to the corporation of the unharvested crops on the land sold.

2. The Tax Court did not abuse its discretion in denying taxpayers' motions to reopen and for further trial to receive allegedly new evidence consisting of a finding by a state probate court that the stock held in the husband's name was his separate property. The motions were tardily made nine months after the hearing below, four months after briefs were filed and only three days before the opinion of the Tax Court. In view of the opinions of the Supreme Court of Arizona and evidence on which the Tax Court relied in holding taxpayers' stock to be community property, the Tax Court properly concluded that if the finding of the lower state court had been received in evidence it would not have been of sufficient weight to alter the Tax Court's conclusion.

3. The taxpayers should be precluded from rearguing the claimed capital gain treatment of the profit they received on the sale of unharvested crops on leaseholds assigned to Black Land. On the prior appeal this Court affirmed the Tax Court's determination denying the capital gain treatment, and denied taxpayers' petition for rehearing. The Supreme Court denied taxpayers' petition for certiorar This Court and the Tax Court properly followed this Court's decision in Bidart Bros. v. United States, 262 F. 2d 607, certiorari denied, 359 U.S. 1003, which is indistinguishable.

ARGUMENT

I

THE TAX COURT CORRECTLY HELD THE STOCK OF TAXPAYERS WHOLLY OWNED CORPORATION TO BE COMMUNITY PROPERTY UNDER THE CONTROL OF THE HUSBAND WHO THEREBY HAD THE RIGHT TO REACQUIRE THE LAND FROM THE CORPORATION. ACCORDINGLY THE TAXPAYERS ARE NOT ENTITLED TO CAPITAL GAIN TREATMENT UNDER SECTION 1231(b)(4) OF THE INTERNAL REVENUE CODE OF 1954 ON THEIR PROFIT FROM THE SALE TO THE CORPORATION OF UNHARVESTED CROPS WITH THE LAND

A. This Court has properly held that Congress did not intend capital gain benefits in instances where taxpayers retain a right to reacquire the land

The Tax Court has held (39 T.C. 231, I-R. 224-226; 48 T.C. 718, II-R. 441-471) that the capital gain treatment afforded by Section 1231(b)(4) of the 1954 Code, Appendix, infra, to certain sales of growing crops with the land is not applicable in 1955, 1956 and 1957 to the taxpayers' profit on the sale of unharvested crops and land to Rancho because the taxpayers retained a right or option to reacquire the land conveyed. The taxpayers argue (Br. 10-34), as they did in the earlier proceeding, that they are entitled to the claimed capital gain treatment. This Court remanded the case to the Tax Court for further proceedings on whether the stock of Rancho was held by the taxpayers as community property under Arizona law. (351 F. 2d 452, II-R. 358-361.) 2/ After hearing further evidence and receiving additional exhibits, the Tax Court determined on remand

2/ This Court there also asked for proceedings with respect to Black Land, which it stated had minor importance. (II-R. 301.)

that the shares of stock issued to the taxpayers were held as community property. (48 T.C. 718, II-R. 441-471.) It is submitted that the Tax Court was clearly correct in its determination.

Section 1231(b), in defining property used in a trade or business, provides in part as follows:

> (4) Unharvested crop.--In the case of an unharvested crop on land used in the trade or business and held for more than 6 months, if the crop and the land are sold or exchanged (or compulosrily or involuntarily converted) at the same time and to the same person, the crop shall be considered as "property used in the trade or business.

The legislative history of this section indicates that Congress intended to afford capital gain treatment only to profits on sales by farmers who were going out of the business of growing crops on land they owned, since the transactions were not in the ordinary course of business. (See S. Rep. No. 781, 82d Cong., 1st Sess., pp. 47-48 (1951-2 Cum. Bull. 458, 491-492) on the Revenue Act of 1951, c. 521, 65 Stat. 452, Section 323 of which added Section 117(j)(3) of the Internal Revenue Code of 1939, which was substantially re-enacted as Section 1231(b)(4), and see also the Joint Committee Staff Summary of Provisions of the Revenue Act of 1951, pp. 32-33 (1951-2 Cum. Bull. 287, 311-312)).

Section 1.1231-1 of the Treasury Regulations on Income Tax (1954 Code), Appendix, infra, reflects this intention by providing in part:

> (f) Unharvested crops. Section 1231 does not apply to a sale, exchange, or involuntary conversion of an unharvested crop if the taxpayer retains any right or option to reacquire the land the crop is on, directly or indirectly (other than a right customarily incident to a mortgage or other security transaction). The length of time for which the crop, as distinguished from the land, is held is immaterial. A leasehold or estate for years is not "land" for the purpose of Section 1231.

This Court has upheld the validity of this regulation. Nutt v. Commissioner, 351 F. 2d 452 (II-R. 358-361); Bidart Bros. v. United States, 262 F. 2d 607, certiorari denied, 359 U.S. 1003. Contrary to the taxpayers' contention (Br. 30-34), the regulation has not been shown to be unreasonable or plainly inconsistent with the statute. Cf. Commissioner v. South Texas Co., 333 U.S. 496, rehearing denied, 334 U.S. 813. It is in accord with the legislative history of Section 1231(b)(4) limiting special capital gain treatment to instances where a seller takes action other than in the ordinary course of his business, that is, to rid himself of his business, or some part of it, by selling in a single transaction some or all of his unharvested crops along with the land he owns on which the crops are growing.

B. Taxpayers had a right to reacquire land sold with unharvested crops

1. The taxpayers' stock in Rancho was community property

The taxpayers here retained a direct or indirect right or option to reacquire the land sold with unharvested crops growing thereon to Rancho, their controlled corporation, and the retention of this right makes them ineligible for capital gain treatment under the statute as implemented by the Treasury Regulations. The record

shows clearly that the Tax Court correctly determined that the taxpayer held the stock in Rancho as community property, so that the right to reacquire the property existed. As Mrs. Nutt testified (Tr. 1, 13-14)[3], when the taxpayers moved to Arizona in 1926 they had no money or property other than personal effects and household goods, and all property they subsequently acquired was obtained with earnings of Mr. Nutt as an electrical lineman or with amounts earned by them from farming.

Under Arizona law, the character of property, whether separate or community, is fixed at the time it is acquired, and remains unchanged unless altered by agreement of the parties or by operation of law. Kingsbery v. Kingsbery, 93 Ariz. 217, 379 P. 2d 893, 898. As the Tax Court pointed out (II-R. 454), the stock acquired by each taxpayer in both Rancho and Black Land was paid for with funds from the account in which was deposited receipts from the sale of farm products and loans with respect to the farming operation.

All property in Arizona, acquired by either spouse during marriage, other than property acquired by gift, devise, or descent, or earned by the wife and her minor children while she lives separate and apart from her husband, is community property. Arizona Revised Statutes Annotated (1956), Sec. 25-211.A, Appendix, infra. This has been interpreted to mean that all property acquired during coverture by the spouses is prima facie community property, as this

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3/ "Tr." references are to the transcript of testimony contained in Volume 3 of the record on appeal.

Court pointed out (II-R. 361), subject to limited specified exceptions, inapplicable here. Prater v. United States, 268 F. Supp. 754 (Ariz.); In re Torrey's Estate, 54 Ariz. 369, 95 P. 2d 990; In re Baldwin's Estate, 50 Ariz. 265, 71 P. 2d 791; Lovin v. Woodward, 45 Ariz. 105, 40 P. 2d 102; see also Mortensen v. Knight, 81 Ariz. 325, 305 P. 2d 463. The force and effect of this legal presumption was described in Porter v. Porter, 67 Ariz. 273, 195 P. 2d 132, as follows:

> There is a legal presumption in this jurisdiction that all property acquired by either spouse during coverture takes on a community character. This presumption can be rebutted only by "strong", "satisfactory", "convincing", "clear and cogent", or "nearly conclusive evidence". In this respect it differs from most legal presumptions that are dispelled immediately upon the production of any evidence negativing the presumption. The court must be satisfied that the property really is separate before it can state that the presumption has been dispelled. As long as there is any doubt, the property acquired during coverture must be presumed to be community property. * * * [Citing Blaine v. Blaine, 63 Ariz. 100, 159 P. 2d 786, 790]. (Underlining supplied.)

See also Kennedy v. Kennedy, 93 Ariz. 252, 379 P. 2d 966. Thus, the fact that the taxpayers acquired this stock while they were married and living together in Arizona was sufficient to create a presumption that the stock was community property. The taxpayers offered no evidence to rebut this statutory presumption that all property acquired during their marriage was community property. There is no merit to the contention (Br. 13-14) that merely taking the stock of their corporations in their separate names established a presumption that it was separate property. The Arizona Supreme Court has held that even where title to real property is taken in the name of the husband and wife as joint tenants, that is not sufficient to rebut the presumption

that all property acquired during coverture is community property. In re Baldwin's Estate, supra. Section 25.211.A of the Arizona Statutes would be meaningless if taking property in the wife's name could rebut the statutory presumption. The case of Petersen v. Commissioner, 35 T.C. 962, relied on by taxpayers (Br. 14), involved the status of real property under California law. In Shoenhair v. Commissioner, 45 B.T.A. 576, also relied on by taxpayers (Br. 14), the case turned on the validity of an oral agreement between husband and wife that earnings of the husband in Arizona were to be his separate property. Neither case is in any way apposite here, as the Tax Court pointed out. (II-R. 455-457.) Jones v. Rigdon, 32 Ariz. 286, 257 Pac. 639, 640, relied on by taxpayers (Br. 12-13, 14), is factually distinguishable. In that case, a down payment on the real property in question was made by personal funds of the wife, a mortgage and note were signed only by her, and other facts, as well as the deed to the realty, showed that the husband intended to make a gift to his wife and intended for her to own the realty as her separate property. Here there was no indication of any intention by the parties that they intended the stock to be other than community property.

The taxpayers reported all income from the sale of their farm products as community income on their tax returns. (II-R. 451.) Mrs. Nutt testified that she and her husband had made no agreement that any of their property was other than community property. (Tr. 15-16.) This testimony is supported by her statements in a will and testament written in 1965 (when she still owned stock in both Rancho and Black Land) that all her property was community property. (II-R. 451; Tr. 22, Ex. JJ.) Her testimony is further supported by

her affidavit of March 4, 1966, filed in the Superior Court of Arizona in the proceedings with respect to the probate of her husband's will, in which she stated, "All of the estate of said deceased is community property, the same having been acquired since his marriage with Eileen M. Nutt." (II-R. 451, Tr. 20, Ex. II.) In this statement she included the stock in Rancho and Black Land which John F. Nutt had held from the time the corporations were formed in 1955 until his death in 1966. In 1957, dividends from Black Land were reported by the taxpayers as community property. (II-R. 450-451.)

Thus the record shows not only that the stock was bought with community funds, and that there was no agreement between the parties that any property they acquired was other than community property, but all the affirmative evidence is to the effect that the stock was community property. The testimony of Mrs. Nutt, together with statements in her will and in the affidavit referred to above, is consistent only with the fact that the stock in Rancho and Black Land was community property.

2. The taxpayer husband could manage and control Rancho stock in his wife's name held as community property

This Court in remanding the case to the Tax Court (351 F. 2d 452, II-R. 358-361) also requested the Tax Court to consider whether the stock registered in the name of Mrs. Nutt could have been managed and controlled by her husband during the taxable years. As the Tax Court pointed out, if Mr. Nutt could vote or dispose of his wife's stock, he would have an indirect right to reacquire the property the taxpayers sold to Rancho. The Tax Court concluded (II-R. 464-465) that Mr. Nutt, as manager of the personal property of the community, had the

legal right under Arizona law to vote the stock issued both in his name and in the name of his wife, and, since he had complete dominion over Rancho, he would have been able to reacquire the land sold by the taxpayers to Rancho.

In Arizona, the husband is the manager of all personalty held as community property, whether standing in his name or that of his wife, and he may contract debts to which all community property is subject. DePinto v. Provident Security Life Insurance Co., 323 F. 2d 826 (C.A. 9th), certiorari denied, 376 U.S. 950; Prater v. United States, 268 F. Supp. 754; City of Phoenix v. State of Arizona, 60 Ariz. 369, 137 P. 2d 783; Mortensen v. Knight, 81 Ariz. 325, 305 P. 2d 463; Shaw v. Greer, 67 Ariz. 223, 194 P. 2d 430. The only limitations on the husband's management of community property are that he may not encumber or sell real property without the consent of his wife, that he must exercise his management and control as a fiduciary for the best interests of the community, and that he must not exercise his management and control in fraud of the interest of the wife. Goodell v. Koch, 282 U.S. 118; Greer v. Goesling, 54 Ariz. 488, 97 P. 2d 218; LaTourette v. LaTourette, 15 Ariz. 200, 137 Pac. 426

In Donato v. Fishburn, 90 Ariz. 210, 367 P. 2d 245, the court enforced a cretitor's claim on the husband's note against community property assets although the wife had not signed the note, and it held that the husband could, as manager of the community property, contract an obligation enforceable against community property assets, regardless whether the marriage community received pecuniary benefit from his acti

It has been stated (Rappeport, The Husband and Management of Community Real Property, 1 Ariz. L. Rev. 13, 33 (1959)):

> * * * The Arizona statute [A.R.S. §25-211 (1955)] provides that as agent of the community, the husband has the general management and control of the community personalty, but does not provide who shall have the management and control of the community realty, apart from the disposition thereof. However, the Arizona court has stated in no uncertain terms that the husband is the "head and master of the community" and there is little doubt that the court was referring to the husband's power to manage both personalty and realty. [Citing City of Phoenix v. State ex rel Harless, 60 Ariz. 369, 137 P. 2d 783 (1943).] (Underlining supplied.)

The power of management includes the power to vote shares of stock and, therefore, to authorize actions by the management of the company. Although record owners of stock in Arizona, as in most states, have prima facie title, and ordinarily the right to vote the stock (Section 10-233, Arizona Revised Statutes Annotated (1956), Appendix, infra; Niesz v. Gorsuch, 295 F. 2d 909 (C.A. 9th)), and even, under some circumstances, the holder of shares endorsed in blank may vote the shares (Provident Security Life Insurance Co. v. Gorsuch, 323 F. 2d 839, 943-944 (C.A. 9th)), certiorari denied, 376 U.S. 950, the law is otherwise where there has been a bona fide transfer (Turnbull v. Longacre Bank, 249 N.Y. 159, 163 N.E. 135, 138; Winans v. Alpha Beta Food Market, 11 Cal. App. 2d 653, 54 P. 2d 48) or where the corporation has notice of conflicting claims (In re Alling's Estate, 186 Misc. 192, 63 N.Y.S. 2d 427, 431-432) (Surr. Ct.)). It must be presumed that the taxpayers here, as individual holders of the stock and also as officers and directors of their controlled corporations, in both capacities knew that the stock issued to them

was community property under Arizona law. Thus, Rancho did have notice of the conflicting claim with respect to the stock issued to Mrs. Nutt; i.e., that under the laws of community property of Arizona the husband had the right to manage and control such stock.

As manager of the personal property or the community, Mr. Nutt had the legal right during coverture, under Arizona law, to vote all the stock of Rancho, both that issued in his name and that issued in his wife's name. He could vote cumulatively for directors or trustees (Section 10-271, Arizona Revised Statutes Annotated (1956)), Appendix, infra) vote to **deposit the shares of Rancho with a** trustee of a voting trust (Section 10-301, Appendix, infra), or even vote to **dissolve** the corporation (Section 10-361, Arizona Revised Statutes Annotated (1956).

Moreover, Section 25.211.B of the Arizona Revised Statutes Annotated (1956), Appendix, infra, provides that "During coverture, personal property may be disposed of by the husband only." See also LaTourette v. LaTourette, supra; Coe v. Winchester, 43 Ariz. 500, 33 P. 2d 286.

It seems clear that under Arizona law, as between husband and wife, only Mr. Nutt could manage, control, and dispose of the corporate stock hold by the taxpayers in Rancho and Black Land, as the Tax Court found. Accordingly, Mr. Nutt had the power to vote the shares of stock so as to enable the corporation to declare

dividends of property, to redeem stock or to sell its realty to its shareholders. The property taxpayers transferred and the stock they received may be viewed as the corpus of a trust for the benefit of the marriage community. Mr. Nutt, as trustee, had unfettered authority during coverture to manage, control, substitute, and dispose of the corpus of the trust in furtherance of the marriage community. Section 25-211, Arizona Revised Statutes Annotated (1956); City of Phoenix v. State of Arizona, supra; Donato v. Fishburn, supra. Immediately after the transfer of the property to Rancho, Mr. Nutt could have directed the corporation, through his absolute voting control, to distribute the property to or for the benefit of the marriage community. Since Mr. Nutt had control of all voting stock of Rancho, and complete dominion over it, he thus retained the right to reacquire, directly or indirectly, on behalf of the marriage community, the land and growing crops transferred to Rancho within the meaning of Section 1.1231-1(f) of the Treasury Regulations. Mrs. Nutt retained the same right through the powers, rights, and duties she granted to her husband as the managing member of the marital community.

3. As between husband and wife, there is no conflict between the Uniform Stock Transfer Act of Arizona and the community property law of that state

The taxpayers contend (Br. 24-25) that Section 10-231, Arizona Revised Statutes Annotated, Appendix, infra, repealed by implication so much of Section 25-211.B as is in conflict with it. A similar argument

was made before the Tax Court on remand, and was rejected by the Tax Court. (II-R. 467-471.) We urge that the Tax Court properly held the argument to be without merit.

Section 10-231 substantially incorporates Section 1 of the Uniform Stock Transfer Act, and provides that title to a stock certificate and the corporate shares it represents can be transferred only by delivery of the certificate endorsed by the one whose name appears on the certificate as the owner, or by delivery of a written assignment signed by such owner. As we have stated above, Section 25-211.B provides that during coverture, personal property may be disposed of by the husband only.

The purpose of Section 1 of the Uniform Stock Transfer Act was to establish the stock certificate itself, and not the books of the corporation, as representative of the ownership of the intangible right of corporate shares. See 6 Uniform Laws Annotated (Uniform Stock Transfer Act), pp. 2, 18. The purpose of the Act was not primarily to determine ownership, but to make uniform in the states the method of transferring title. Fardy v. Mayerstein, 221 Ind. 339, 47 N.E. 2d 315; Untermyer v. State Tax Commission, 102 Utah 214, 129 P. 2d 881, reversed on other grounds, 316 U.S. 645. The Uniform Stock Transfer Act is for the protection of a transferee who purchases the stock in good faith without notice of any fraud or irregularity in the endorsement. McCullen v. Hereford State Bank, 214 F. 2d 185 (C.A. 5th); Chatz v. Midco Oil Corp., 152 F. 2d 153 (C.A. 7th), certiorari denied, 329 U.S. 717; see also Hodson v. Hodson Corp., 32 Del. Ch. 76, 80 A. 2d 180.

In resolving any ostensible conflict between the Act and the Arizona community property law, it is clear that the Arizona courts would be reluctant to infer that any community property law has been abrogated. In re Baldwin's Estate, 50 Ariz. 265, 71 P. 2d 791. Any seeming inconsistency should be resolved in favor of the well-established principle that in Arizona the husband has the general management of the community, whether standing in his name or that of his wife (City of Phoenix v. State of Arizona, 60 Ariz. 369, 137 P. 2d (783), and that he is head of the family and its agent in controlling and managing the community property (Donato v. Fishburn, supra; Fee v. Arizona State Tax Com., 55 Ariz. 67, 98 P. 2d 467, 468), as the Tax Court correctly reasoned (II-R. 464).

Statutes should, of course, be given a reasonable interpretation which will render them valid and operative rather than one which would defeat them. Kelly v. Bastedo, 70 Ariz. 371, 220 P. 2d 1069; Hodson v. Hodson Corp., supra. Indeed, the possibility of any conflict in these sections of the Arizona statutes is eliminated under the facts of this case. Thus, under Section 25-211, the husband could manage, control, and dispose of all stock held by the marriage community pursuant to the public policy of Arizona to place all community personal property under the exclusive management of the husband. If Mrs. Nutt transferred stock registered in her name to a bona fide purchaser for value without her husband's consent, she could, under Section 10-231, transfer good title, and her husband could not rescind his wife's disposition because as manager of the community he caused the stock to be registered in his wife's name, and the

bona fide purchaser relied thereon. It should be noted, however, that in these circumstances Mrs. Nutt could not have satisfied the requirement of Section 10-241, Appendix, infra, that one who transfers a stock certificate for value warrants that he has a legal right to transfer it.

As between husband and wife, however, the taxpayer-wife could not deny that her husband had absolute power to manage, control, and dispose of the stock registered in her name. The Arizona Court of Appeals has held that Section 25-211, Arizona Revised Statutes Annotated (1956), is relevant in determing whether stock is separate or community property. Warren v. Warren, 2 Ariz. App. 206, 407 P. 2d 395. In that case, the husband had acquired stock in his name alone under a stock purchase plan of his employer, and in a divorce action the court awarded the wife the value of the husband's stock interest, observing that the stock plan was community property, regardless of the fact that the plan was in the husband's name alone. Again, in Spector v. Spector, 94 Ariz. 175, 382 P. 2d 659, 662, the Arizona court imposed a lien on stock, which had been community property but was awarded to the husband as his separate property in a divorce action, in order to secure payment to the wife of the value of her half of the community property awarded to the husband.

In real estate transactions the Arizona courts have held that a wife is equitably estopped from challenging the validity of the

transactions negotiated by the husband where she had not signed or entered into the transaction. Nickerson v. Arizona Consolidated Min. Co., 54 Ariz. 351, 95 P. 2d 983; Hall v. Weatherford, 32 Ariz. 370, 259 Pac. 282. A fortiori, it is submitted, the Arizona court would do the same with respect to stock to encourage the purposes of the community property law.

II

THE TAX COURT DID NOT ABUSE ITS DISCRETION IN DENYING TAXPAYERS' MOTIONS TO REOPEN AND FOR FURTHER TRIAL TO RECEIVE ALLEGED NEWLY DISCOVERED EVIDENCE

On August 15, 1967, three days before the opinion of the Tax Court was filed, but over nine months after the hearing of the case on remand, and approximately four months after briefs were filed, the taxpayers filed a motion to reopen the case to receive allegedly new evidence. (II-R. 418-440.) Attached to the motion was a certified copy of a minute entry dated July 31, 1967, of the Superior Court of Pinal County, Arizona, entered in connection with the petition for final distribution of the estate of the taxpayer-husband, John F. Nutt, in which it was stated that the Court "FINDS that John F. Nutt was the sole owner of 75 shares common stock of Rancho Tierra Prieta, a corporation and sole owner of 40 shares of stock of Black Land Farms, Inc." (II-R. 421.) Also attached to the motion was a certified copy of a final decree of distribution (II-R. 422-440) in which John F. Nutt was also described as the sole owner of these shares (II-R. 440). After a hearing on the motion (II-R. 485-525), on September 15, 1967, the taxpayers filed a motion for further trial to present newly discovered evidence

consisting of the same two exhibits they had attached to the previous motion (II-R. 474-477). Memoranda were filed (II-R. 527-549), and on November 17, 1967, the Tax Court entered its order denying the motions, and stating that if the documents attached to the taxpayers' motions had been received in evidence, the additional evidence would not have been of sufficient weight to alter its conclusion (II-R. 550-551).

The taxpayers now urge (Br. 26-30) that the Tax Court erred in refusing to reopen the case, arguing that the Tax Court failed to follow the admonition of Commissioner v. Estate of Bosch, 387 U.S. 456, 465, that where there is no decision by the highest court of a state, "then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." The Commissioner contends that there is no merit to the taxpayers' contention, and that the Tax Court in no way abused its judicial discretion in denying the motions.

The granting or refusing of a motion to reopen the record to receive newly discovered evidence is clearly within the sound discretion of the Tax Court. Bankers Coal Co. v. Burnet, 287 U.S. 308; Henry Van Hummell, Inc. v. Commissioner, 364 F. 2d 746 (C.A. 10th) certiorari denied, 386 U.S. 956; Chiquita Mining Co. v. Commissioner, 148 F. 2d 306 (C.A. 9th). In the absence of any abuse of discretion, such denial should not be reversed. Pfister v. Finance Corp., 317 U.S. 144, rehearing denied, 317 U.S. 714, affirming 123 F. 2d 543 (C.A. 7th); Conboy v. First Nat. Bk. of Jersey City, 203 U.S. 141, 149 150. Moreover, a motion for new trial on the ground of newly discovere

evidence must show that it is of such character that on new trial such evidence will probably produce a different result. Marshall's U.S. Auto Supply v. Cashman, 111 F. 2d 140, 142 (C.A. 10th), certiorari denied, 311 U.S. 667. The Tax Court found the proferred evidence unpersuasive. (II-R. 551.)

The documents relied on by the taxpayers here do not purport to clarify any rule of law of Arizona, for they describe neither the evidence on which the Pinal County Court made its finding nor the reasoning of the Court. There is no showing that any evidence at all was offered to the County Court Judge, and certainly none that was not offered in the Tax Court below. There is no showing that the Pinal County Judge was advised that there was any dispute about the manner in which Mr. Nutt held the stock.[4/]

The Tax Court, as we have shown in the first point of this brief, carefully analyzed the opinions of the Supreme Court of Arizona in reaching its conclusion that Mr. Nutt held the stock of Rancho and Black Land as community property. It has given "proper regard" to those decisions within the meaning of the Bosch case, supra. It is submitted that the Tax Court had no duty to receive

4/ The Commissioner's brief in opposition to the motion to reopen (II-R. 548) informed the Tax Court that proof could be offered that counsel for the co-executrices had advised the Judge of the Superior Court of Pinal County, who entered the order relied on, that the finding was necessary for income tax purposes, and that there was no issue as to how the stock was held.

unpersuasive evidence not in existence at the time of the trial, where there was no showing that the newly discovered evidence would produce a different result. No abuse of discretion has been shown.

III

THE TAXPAYERS SHOULD BE PRECLUDED FROM REARGUING THE CLAIMED CAPITAL GAIN TREATMENT OF THE PROFIT FROM THE SALE OF UNHARVESTED CROPS ON LEASEHOLDS TRANSFERRED TO BLACK LAND

The Tax Court on remand interpreted (II-R. 446) the opinion of this Court (351 F. 2d 452, 453, II-R. 358, 359, rehearing denied November 9, 1965, certiorari denied 384 U.S. 918) correctly to be an affirmance of the Tax Court's prior holding (I-R. 224-225, 256) that the gain on the sale of unharvested crops growing on the leaseholds assigned to Black Land was taxable as ordinary income. See Bidart Bros. v. United States, 262 F. 2d 607, certiorari denied, 359 U.S. 1003. The taxpayers have attempted to reargue this issue, contending (Br. 34-35), as they did before, that the leaseholds constituted "property used in the trade or business" as defined in 1954 Code Section 1231(b)(1) because leaseholds are subject to the depreciation allowance for which provision is made in Code Section 167. We are not here concerned, however, with the classification of a leasehold; the case involved only the portion of the sales price ($97,856.87) attributable to the unharvested corps ($94,656.87). (I-R. 240.)

As this Court pointed out in its Bidart opinion, the rule regarding a sale of land together with a mature but unharvested crop is that the sale price attributable to the unharvested crop is taxable as ordinary income rather than capital gain (Watson v. Commissioner, 345 U.S. 544); and that rule has been changed only to the extent that Congress has by statute provided that in the case of an unharvested crop on land used in the trade or business and held for more than six months, the crop is to be considered as "property used in the trade or business" (and thus accorded capital gain treatment) if the crop and the land are sold or exchanged at the same time and to the same person. 1954 Code Section 1231(b)(4). Of controlling importance here is the fact that the statute applies only to a sale of "land", while the sale here was of a leasehold. As this Court held in Bidart, a leasehold is not "land" for the purposes of this statute. See also Section 1.1231-1(f) of the Treasury Regulations on Income Tax (1954 Code). This holding is consistent with the holding of the Supreme Court in Corn Products Co. v. Commissioner, 350 U.S. 46, that capital gains treatment must be narrowly confined.

The prior decision of this Court on this issue, as to which the Supreme Court denied certiorari, was correct and should be reaffirmed.

CONCLUSION

The decisions of the Tax Court were correct and should be affirmed.

Respectfully submitted,

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JULY, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____ 1968.

_____
Elmer J. Kelsey

APPENDIX

Internal Revenue Code of 1954:

SEC. 1231. PROPERTY USED IN THE TRADE OR BUSINESS AND INVOLUNTARY CONVERSIONS.

* * *

(b) Definition of Property Used in the Trade or Business.--For purposes of this section--

(1) General rule.--The term "property used in the trade or business" means property used in the trade or business, of a character which is subject to the allowance dor depreciation provided in section 167, held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not--

(A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year,

(B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or

(C) a copyright, a literary, musical, or artistic composition, or similar property, held by a taxpayer described in paragraph (d) of section 1221.

(2) Timber or coal.--Such term includes timber and coal with respect to which section 631 applies.

(3) Livestock.--Such term also includes livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 months or more from the date of acquisition. Such term does not include poultry.

(4) Unharvested crop.--In the case of an unharvested crop on land used in the trade or business and held for more than 6 months, if the crop and the land are sold or exchanged (or compulsorily or involuntarily converted) at the same time and to the same person, the crop shall be considered as "property used in the trade or business."

(26 U.S.C. 1964 ed., Sec. 1231.)

SEC. 1239. GAIN FROM SALE OF CERTAIN PROPERTY BETWEEN SPOUSES OR BETWEEN AN INVIDIDUAL AND A CONTROLLED CORPORATION.

(a) Treatment of Gain as Ordinary Income.--In the case of a sale or exchange, directly or indirectly, of property described in subsection (b)--

* * *

(2) between an individual and a corporation more than 80 percent in value of the outstanding stock of which is owned by such individual, his spouse, and his minor children and minor grandchildren;

any gain recognized to the transferor from the sale or exchange of such property shall be considered as gain from the sale or exchange of property which is neither a capital asset nor property described in section 1231.

(b) Section Applicable Only to Sales or Exchanges of Depreciable Property.--This section shall apply only in the case of a sale or exchange by a transferor of property which in the hands of the transferee is property of a character which is subject to the allowance for depreciation provided in section 167.

(26 U.S.C. 1964 ed., Sec. 1239.)

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.1231-1 Gains and losses from the sale or exchange of certain property used in the trade or business.

* * *

(f) Unharvested crops. Section 1231 does not apply to a sale, exchange, or involuntary conversion of an unharvested crop if the taxpayer retains any right or option to reacquire the land the crop is on, directly or indirectly (other than a right customarily incident to a mortgage or other security transaction). The length of time for which the crop, as distinguished from the land, is held is immaterial. A leasehold or estate for years is not "land" for the purpose of section 1231.

* * *

(26 C.F.R., Sec. 1.1231-1.)

3 Arizona Revised Statutes Annotated (1956):

§ 10-152. General corporate powers

In addition to the powers granted to corporations by law, they may:

1. Have perpetual succession.

2. Sue and be sued by the corporate name.

3. Have a common seal and alter the same at pleasure.

4. Provide that the shares or interest of shareholders be transferable and prescribe the manner of making the transfer.

5. Exempt private property of shareholders from liability for corporate debts.

6. Make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals enjoy.

7. Establish by-laws and make rules and regulations deemed expedient for the management of their affairs not inconsistent with law.

§ 10-231. Transfer of certificates and shares

A. Title to a certificate and to the shares represented thereby can be transferred only:

1. By delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby.

2. By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the certificate or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

B. The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and the certificate itself provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent.

§ 10-233. Corporation not forbidden to treat registered holder as owner

Nothing in this article shall be construed as forbidding a corporation the right to:

1. Recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner.

2. Hold liable for calls and assessments a person registered on its books as the owner of shares.

§ 10-241. Warranties on sale of certificate

A. A person who for value transfers a certificate, including one who assigns for value a claim secured by a certificate, unless a contrary intention appears, warrants:

1. That the certificate is genuine.

2. That he has a legal right to transfer it.

3. That he has no knowledge of any fact which would impair the validity of the certificate.

* * *

§ 10-249. Interpretation of article

This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

§ 10-271. Cumulative voting

At all elections for directors or trustees of the corporation, each shareholder may cast as many votes in the aggregate as he is entitled to vote under its charter, multiplied by the number of directors or trustees to be elected. Each shareholder may cast the whole number of votes, either in person or by proxy, for one candidate, or distribute such votes among two or more candidates.

§ 10-301. Trust agreement

By written agreement, certificates for shares of stock of a corporation of this state may be deposited within or without this state by the holder thereof with any person as trustee, or with a depositary designated by or pursuant to the agreement to act for the trustee, for the purpose and with the effect of vesting in the trustee or a majority of the trustees, or in such person designated by or pursuant to the agreement, all or any of the voting, consenting or other rights in or in respect of the shares represented by the certificates or for any other lawful purposes specified in the agreement, and upon the terms, provisions and conditions as stated therein. A trustee may be a corporation if authorized to act as trustee.

9 Arizona Revised Statutes Annotated (1956):

§ 25-211. Property acquired during marriage as community property; exceptions; disposition of personal property

A. All property acquired by either husband or wife during the marriage, except that which is acquired by gift, devise or descent, or earned by the wife and her minor children while she lives separate and apart from her husband, is the community property of the husband and wife.

B. During coverture, personal property may be disposed of by the husband only.